In The Supreme Court of the United States

OCTOBER TERM 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

-vs-

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

On Appeal from the United States District Court for the Middle District of Florida

BRIEF OF APPELLEES, SUWANNEE STEAMSHIP COMPANY AND COMMODORES POINT TERMINAL CORPORATION

JAMES F. MOSELEY
Toole, Taylor, Moseley, Gabel & Milton
Suite 1014 Barnett Bank Building
Jacksonville, Florida 32202

Attorneys for Appellees, Suwannee Steamship Company and Commodores Point Terminal Corporation

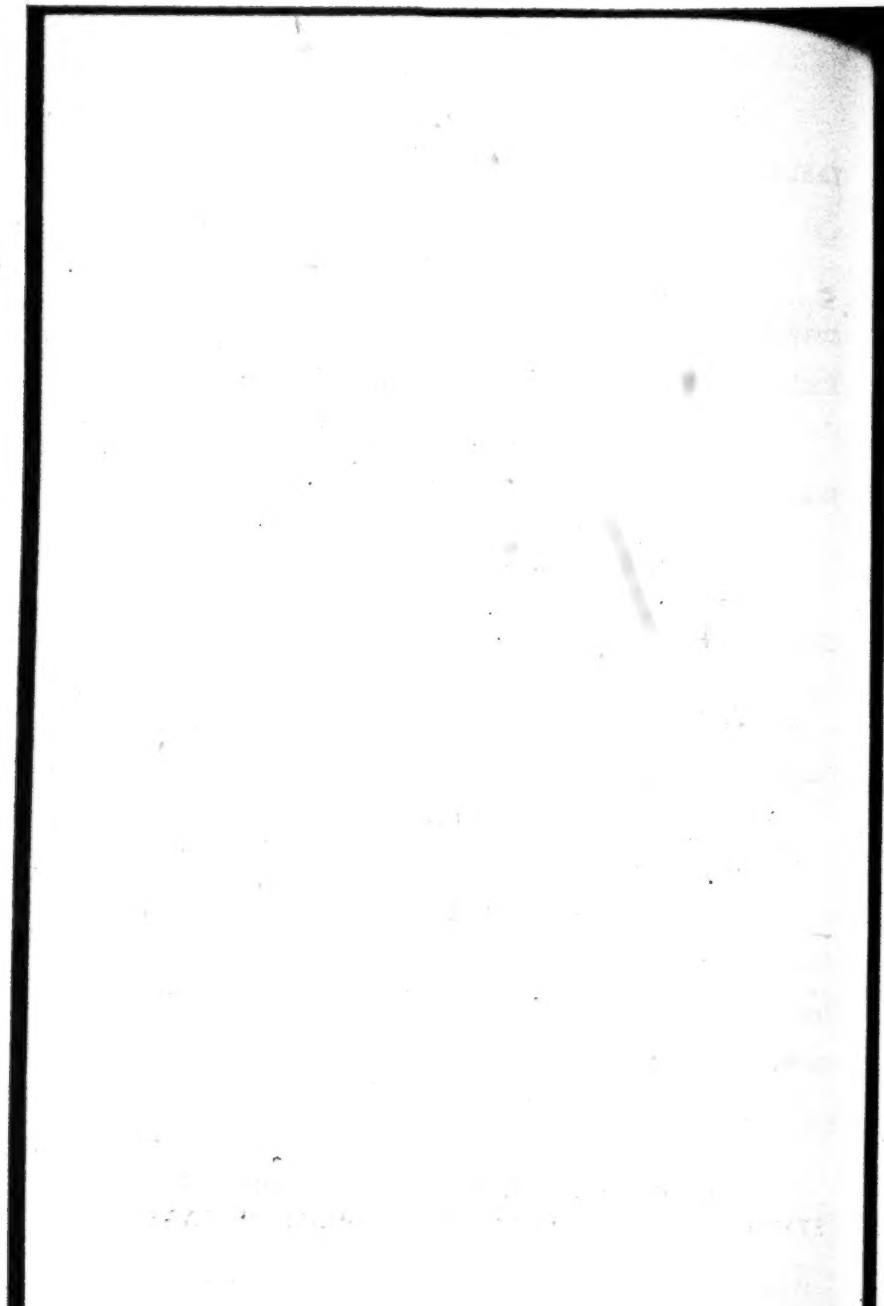
SUBJECT INDEX

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES — Continued



In The
Supreme Court of the United States

OCTOBER TERM 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

-vs-

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

On Appeal from the United States District Court for the Middle District of Florida

---

BRIEF OF APPELLEES, SUWANNEE STEAMSHIP COMPANY AND COMMODORES POINT TERMINAL CORPORATION

REPORT OF OPINION, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF CASE

Pursuant to Rule 40 Supreme Court Rules and Paragraph 3 thereof, Appellee makes no further statement of the case nor includes further matters covered by Rule 40(a)-(c) inclusive.

QUESTIONS PRESENTED

1. Whether the District Court erred in holding unconstitutional Chapter 70-224 Laws of Florida published at Chapter 376 Florida Statutes (1970), as an attempt to legislate within the field of substantive maritime law, that is exclusively within the Federal domain.

2. Whether the District Court erred in holding that the Federal Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session (April 3, 1970) did not create a premption issue.

SUMMARY OF ARGUMENT

I.

The Constitution declares in Article III, Section 2, that "the judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction" and Article I, Section 8, Congress is "to make all laws which shall be necessary and proper for" carrying out granted power. This Federal authority to act in maritime matters and to establish uniformity was designed to meet a need. The need existed then and exists now. The need for uniformity as pronounced in *Jensen* and *Knickerbocker* gives reason to base, as did the Court below, that the Florida Act is unconstitutional and therefore, null and void.

The Florida Act is an intrusion into the Federal Admiralty uniformity. It increases and supplements liability involving shipowners and terminal operators. In addition, defenses are abrogated, as well as, unreasonable administrative requirements are made including boarding vessels, determining the seaworthiness of vessels and the posting of insurance.

The Court below was correct in stating that the intrusion into the maritime field by this Florida Act was substantially greater than the State Act in *Jensen*.

II.

The Court below did not err concerning Federal preemption of the field since the Court did not rule on this question. Appellant states that the Court erred in construing the Federal Water Quality Improvement Act preempted State legislation. However, this is clearly not an issue in this Appeal since the Court did not so rule.

ARGUMENT

I

THE COURT BELOW CORRECTLY HELD THAT CHAPTER 376 FLORIDA STATUTES ANNOTATED WAS IN VIOLATION OF ARTICLE III, SECTION 2, CLAUSE 3 OF THE CONSTITUTION OF THE UNITED STATES AND WAS NULL AND VOID AND WITHOUT AFFECT.

The Court below correctly decided that Chapter 376, Florida Statutes Annotated, hereinafter called Florida Act, was null and void and without affect, since in violation of Article III, Section 2, Clause 3 of the Constitution of the United States. The nerve center of the case is not, as Appellant contends, i.e., land damage and/or protection of water. In its entirety the Act is a restriction, restraint, and an unwarranted interference with shipping and carriage of goods by water. For this reason, the Act earned the fate it achieved in the Court below.

A brief reflection into the past and the reason for the constitutional grant of:

> (a) The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction.
>
> (b) Congress shall make necessary and proper laws carrying out granted power.

leaves one firmly convinced of the necessity of this constitutional provision. The fact was that an urgent need for uniformity was needed when it was written and there continues to be that need for uniformity at present. Prior to the American Revolution the Vice Admiralty Courts in the then British colonies of North America were most powerful. Upon the commencement of the Revolution and the termination of these Courts, each of the thirteen states began providing its own determination of admiralty matters and it has been recognized that these state provisions varied widely. Benedict, *the American Admiralty* (third edition 1894) 89.

The reason for this Constitutional Provision is certainly clear. One can hardly fathom the consequences that would be foreseen by the allowing of each state to determine the consequences, duties, obligations and responsibilities of maritime matters relating to each state. The United States would have been the same as the Balkan countries striving against each other. This was so clear to the advocates of the Constitution that Hamilton in writing the Federalist LXXX from McLean's Edition, New York, 1788 stated:

> "The fifth point will demand little animadversion. The most bigoted idolisers of State authority have not thus far shown a disposition to deny the national judiciary the cognisances of maritime causes. These so generally depend on the laws of nations, and so commonly affect

> the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present confederation, submitted to federal jurisdiction."

Thus we see that even the purgatory between state maritime confusion of the Revolution and the lucidity of the Constitution, that is to say the Articles of Confederation, granted this unique and needed maritime power.

Our unique form of government has accurately been described as a miracle. The Federal-State areas of responsibility have clearly been categorized in *Railroad Company v. Fuller*, 84 U.S. (17 Wall) 564 (1874), 568:

> In the complex system of polity which exists in this country the powers of government may be divided into four classes:
>
> Those which belong exclusively to the states.
>
> Those which belong exclusively to the national government.
>
> Those which may be exercised concurrently and independently by both.
>
> And those which may be exercised by the states but only until Congress shall see fit to act upon the subject.

The Court below held that the matter herein under consideration belonged exclusively to the Federal Government as listed in category two above. Our position here, as below, is that the Florida Act and the Federal Act cannot coexist, since the field of maritime belongs exclusively to the National Government.

In *Workman v. New York*, 179 U.S. 552 (1900) the Court recited the truism that the law of the state cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of maritime law in maritime cases. In *Workman* the issue before the Court was whether the City of New York could be responsible for damages incurred to another vessel by the City of New York's fireboat. In holding against the position of the City of New York, the Court applied the uniform law as follows:

> The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal government. Thus, if

> the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution . . .
>
> The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice . . .

In addition, the Court cited with approval the *Lottawanna*, 88 U.S. (21 Wall) 558 (1874):

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states . . .

At Page 22 of Appellant's brief it admits what cannot be refuted, to-wit: "It is true that Congress alone may regulate maritime commerce." Then without meeting that issue the Appellant proceeds in another direction. The Court below simply said "that the Florida Act constituted an unlawful intrusion into the exclusive Federal admiralty domain to the extent that the act would change substantive maritime law." However, the Appellant by attempting to direct attention to a "sea to shore" tort would attempt to show that maritime

matters were not involved. In truth and in fact, it is the maritime matter that is before the Court. It is *not* a question of police power. It is *not* a question of whether the Constitution was correct when written, as now interpreted by the Florida Legislature but, what the Constitution actually created and what it stands for.

The criteria by which the exclusive power of the Federal government is exercised was enunciated in the *Hamilton*, 207 U.S. 398 (1907), to-wit, power over the maritime law given by the Constitution:

(a) is an independent source of authority to regulate navigation and shipping, and,

(b) is more extensive than even the commerce clause. How can it possibly be said by Appellant that the power to regulate on navigable waters in other than exclusive?

The Federal Water Quality Imprvement Act of 1970, Pub. L. 91-224, 91st Congress, 2nd Session (April 3, 1970); 33 USC § 1161, hereafter termed Federal Act, restricts itself to "navigable waters." Therefore, we submit that the regulation is solely within the exclusive jurisdiction of Congress and that the State Act is void.

In *Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917), the Supreme Court held that the workmen's compensation statute for the State of New York could not be applied to a longshoreman's death occurring aboard a vessel on navigable waters. The Court interpreted Section 2, Article III of the Constitution (the judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction) and Section 8, Article I (Congress shall make necessary and proper laws carrying out granted power). The Court stated, "In the ab-

sence of some controlling statute the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to the matter within the admiralty and maritime jurisdiction" and further "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.

The Court held that the State Legislature could not affect the general maritime law since,:

> "If New York can subject foreign ships coming into her port to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to the maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. . . .
>
> The Legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid."

Some two years later in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) the Court was confronted with the same problem wherein Congress had attempted to correct the shortcoming of *Jensen*. Congress had merely added to the saving clause "to claimants the rights and remedies under the Workmen's Compensation laws of any state." It was this amendment that was under attack. The Court in discussing a case of then recent vintage *Chelentis v. Luckenback Steamship Co.*, 247 U.S. 372 (1918) further expanded on Jensen as follows:

> In *Chelentis* v. *Luckenbach S. S. Co.* (June, 1918), 247 U. S. 372, an action at law seeking full indemnity for injuries received by a sailor while on shipboard, we said: "Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'" And, concerning the clause, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," this: "In *Southern Pacific Co.* v. *Jensen*, we definitely ruled that it gave no authority to the several States to enact legislation which would work 'material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.'"

Further, as to the problem confronting the Court in *Knickerbocker* the Court stated that it was unquestionable that a uniformity was needed and that the commercial character of intercourse between states and foreign states was crucial. This was stated in the following language:

> As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and em-

powered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna*, 21 Wall. 558, 574, 575. The field was not left unoccupied; the Constitution itself adopted the

> rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for a multitude of adjudications by the admiralty courts. See *Workman* v. *New York City*, 179 U.S. 552, 557, *et seq.*

This is what the law is. The regret and sincere melancholia that all persons feel, including the maritime world, over disasters should as the Torrey Canyon do not change this law. Nor does the fact that Appellant at Page 32 of its brief continues to describe the Florida Act as dealing with "sea to shore torts." The *Florida Act* certainly does not say that. Nor is the constitutional provision or the soundness of *Jensen* changed by the cost to peripheral businesses such as airlines, buses, taxis and rental car companies over which the Appellant sheds his crocodile tears.

Therefore, having reached our conclusion that the Constitution desires uniformity in maritime matters, what makes the *State Act* an intrusion thereto. Appellant would state at Page 35 of its brief that the Florida Act subjects owners of vessels and terminal facilities to two principal conditions. The first states Appellant is that under Section 376.12 anyone who permits or suffers a polluting discharge is absolutely liable to the state for clean up and for damages resulting from injury to others. The second is that F.S. 376.14 requires owners and operators of terminal facilities or vessels to maintain with the Department of Natural Resources evidence of financial responsibility based on the capacity of the terminal facility or tonnage of the ship, the cargo carried and other similar factors. However, such a cavalier and cursory summation of the Florida Act that requires, Pages 56 through 74 of Appendix is most appalling when one considers the vital factors of the Act.

What, then makes the Act such an unlawful intrusion into the exclusive Federal admiralty domain? The entire Act.

The Court below held the most obvious effect would be liability in maritime matters. The Court below stated that while the Federal Act would excuse a shipper or carrier who demonstrates that the spill was caused by an Act of God, an act of war or act of omission of a third party, the Florida Act recognizes none of these defenses. This is certainly a "principle condition."

Further, the Court below found that the remedies available under maritime law for private injuries were well settled in that oil pollution is a maritime tort. This is certainly a "principle condition."

Further, there are other substantial and onerous burdens imposed that affect maritime matters. The Court below stated these burdens were intrusions greater than in the *Jensen* case, supra. These intrusions dispel once and for all the "sea to shore" concept. Definitions included in the Act include defining that a "vessel" shall be considered as a terminal facility when it is making vessel to vessel transfers. "Transferred" further is defined as including both onloading and offloading. Further, Section 7 of the Act allows the Department to adopt regulations without precisely defining the scope of such regulations. The regulations are to cover, among others, the boarding of a vessel by state personnel to make a determination of requirements for minimum weather and sea conditions, for permitting a vessel to enter port and for the safety, and operation of vessels, barges, tugs, motor vehicles, motorized equipment and other equipment relating to the use and operation of terminal facilities, refineries, etc. One can well imagine a vessel with a port manager aboard sailing under the flag of the State of Florida proceeding to

the sea buoy and informing vessels of American flag and foreign flag that they cannot enter the Port of Jacksonville or some other Florida port. Then as required by Section 7(i) notify all other ports in the State of this refusal. One can further visualize the same person using subsection (g) to terminate transfer of oil products between ships and terminals at some time during the discharge or receipt of cargo still flying the flag of the State of Florida from his boat.

This is a far different situation than involved in *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1886) wherein the Court upheld the right of Louisiana to disallow persons with yellow fever from coming into the area. *Morgan* is substantially different and critically different than the instant matter. The matter regulated was in essence people. It was not the ships *per se* that were the subject matter of the litigation. It was persons that may be germ carriers. In addition, it should be mentioned that cargo was also the subject of the examinations that would be conducted; however, it was not the inherent nature of the cargo that was being examined. What the cargo would be inspected on would be matters alien to its general nature, i.e. germ or contamination that might cause problems. There was no check nor investigation to determine the validity of a type of cargo coming into the City. Furthermore, the remedy was very painless and applied to everyone, i.e. fumigation. In other words, this was in the form of a temporary deterent that could be corrected. In addition, the Court gives great credence in describing the quarantine wherein it was stated:

> "This system of quarantine differs in no essential respect from similar systems in operation in all important sea ports all over the world, where commerce and civilization prevail."

In addition, the humanitarian aspect of this case was observed where the Court stated:

> "Safe and ample arrangements can be made for care and treatment of diseased passengers and for the comfort of their companions, as well as the cleansing and disinfecting of the vessel."

However, the Court was called upon to answer in fact whether the fee for clearing any contamination was in fact a tonnage tax. In addition, the Court held that it was not. The rational was simply that quarantine laws are so analogous in most of their features to pilotage laws in their relationship to commerce that no reason can be seen why the same principle should not apply. The Court justified this by saying certainly quarantine was a more sensible matter than were the half pilotage rates that were customary.

Morgan is certainly different from the Florida Statute since no requirements of liability were mentioned or even suggested, nor was there any requirement that bonds be posted or insurance be set forth to cover the monies charged during the fumigation, and certainly there was no requirement that any vessel owner be liable without fault for any contagion or any plague that he might trigger by having a diseased passenger or crewmember on board. In all candor, we submit that the *Morgan* case is inapplicable and need not require further discussion.

What the states can and cannot do in the maritime filed should hardly come as any great surprise to the State of Florida or the amicus curiae in this case. In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) the Court applied the general maritime law and not the law of the State of New York to an injury sustained by a visitor on board a vessel in New York Harbor.

In a most relevant case of recent vintage, not cited in Appellant's brief, a Florida statute was under consideration by the United States Court of Appeals for the Fifth Circuit. In *Branch v. Schumann*, 445 F. 2d 175 (5th Cir. 1971) 1971 A.M.C. 2536, the Court had under interpretation a Florida statute F.S.A. §371.52 that provided:

> "All boats, of whatever classification, shall be considered dangerous instrumentalities in this state and any operator of such boats shall, during any utilization of said boats, exercise the highest degree of care in order to prevent injuries to others. Liability for negligent operation of a boat shall be confined to the person in immediate charge or operating the boat and not the owner of a boat, unless he is the operator or present in the boat when an injury or damage is occasioned by the negligent operation of such vessel, whether such negligence consists of a violation of the provisions of the statutes of this state, or negligence in observing such care and such operation as the rules of the common law require."

The Plaintiff asserted that the Florida statute imposed the highest degree of care on an owner-operator of a motor boat and accordingly submitted a requested instruction thereon. The trial judge refused to grant such an instruction and the Court of Appeals affirmed. The Court held concerning the applicability of the Florida statute that admiralty retains exclusive jurisdiction of this accident since the alleged tort occurred upon navigable waters. Once admiralty jurisdiction is established then all of the substantive rules and precepts peculiar to the law of the sea become applicable.

The Plaintiff attempted to argue that *Kermarec* simply set a minimum standard of care which any state, in its discretion

may supplement by imposing a stricter burden on the owner of a vessel in relation to his conduct towards guests. The Court, however, stated that they were "unimpressed by plaintiff's linguistic gyrations." And that any such supplementation necessarily entails alteration of an admiralty norm in direct contravention of the quest for uniformity and the Supreme Court's *Kermarec* mandate that the defendant's conduct be measured by maritime standards. We submit that the reasoning of *Kermarec* and the *Branch case shows* another judicial pronouncement as to the exclusiveness of the maritime jurisdiction and further puts to rest the theory of the state in this case wherein they attempt to show that the Florida statute was merely a supplementary facet and was filling in "gaps" that existed in the Federal Enactment.

Appellant attempts to reduce the argument of Appellees "to its last analysis." However, their analysis of our position is incorrect. Our position is simply that there is no collision between the exclusive admiralty facets of the Federal law and police power. It is simply that the former controls in this matter. The collision never comes into being. The Court below stated that the second contention of Appellees was that the Florida Act violated the commerce clause, but the Court further stated (Page 40 Appendix) that the resolution of the initial contention concerning the exclusive federal domain matter dictated that the second contention need not be discussed. However, since plaintiffs resurrected this issue in their brief we would desire to discuss same.

If we assume arguendo that the National government does not have any exclusive right to regulate maritime and shipping on navigable waters by means of the Federal Act herein then it is necessary to determine whether or not the matter can be the subject of exercising of power concurrently and independently by both sovereigns. Apart from the maritime

powers, certainly no one would quarrel with the constitutional grant of power over interstate commerce that likewise requires and demands a single uniform rule. Further, a state statute by its wording or operation that prevents, obstructs or burdens interstate commerce is certainly invalid regardless of its purpose and not even the police power of the state can justify a *substantial* interference with interstate commerce.

In *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945) the Court had under its review an Arizona statute, entitled the Arizona Train Limit Law. The law made it unlawful for any person or corporation to operate within the state a railroad train of more than fourteen passenger cars or seventy freight cars. In holding the law to be an unconstitutional burden on interstate commerce, the Court stated that Congress by acting in the interstate commerce field is not deemed to have striken every state statute protecting health and safety of the public, but if the State law in terms of its practical administration interferes then it should be void. Mr. Chief Justice Stone speaking for the Court stated:

> But ever since Gibbons v. Ogden, 22 U.S. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state or regulate those phases of the national commerce which because of the need of national uniformity demand that their regulation be prescribed by a single authority.

The Court held there was a serious burden on interstate commerce because the railroad was subject to regulation that was not uniform throughout the various states, and that railroads would be burdened in having to change its flow of transportation in every state. As a result the unsatisfied need

for uniformity in regulation was evident. The Court thereupon concluded that the state interest cannot be preserved at the expense of the national interest.

How similar is the instant situation where there is such a substantial burden on shipping. The State Act with its numerous persons boarding the vessels, determining weather and wind conditions for future movement, the requiring of filing various papers by owners and operators with state agencies is so akin to the *Southern Pacific* case to be readily apparent. *Southern Pacific* and the instant case involve physical matters, i.e. hampering of trains and ships. In our case there are also physical matters, acts and possible consequences that might flow to vessel owners, operators and terminal owners and operators that will have consequences upon interstate and foreign commerce.

Appellant relies strongly on *Huron Portland Cement Company v. Detroit*, 362 U.S. 440 (1960) since at first blush there appears to be some similarities. However, a closer review shows otherwise. Before the Court was a record involving the enforcement of a criminal provision of the Municipal Code of Detroit for violation of smoke emission provisions. There was no meeting of vessels by city employees, determining weather conditions, requiring posting of insurance, nor was there the unlimited liability provision, nor was there a provision that defenses would not be available but that there was absolute liability. Further, the ordinance applied to everyone and everybody and the penalties apparently were uniform. The Court stated that the Constitution in conferring upon Congress the regulation of commerce did not intend to terminate the states from legislating on all subjects relating to health and welfare. In

other words the situation was that all citizens or visitors in the Detroit area might be subject to a miniscule hundred dollar fine if certain smoke was emitted. However, the same could conceivably be true where the master of the vessel would be penalized for jay walking or littering a public park. Most assuredly the Detroit ordinance was not a "substantial burden." In addition, the Court recognized that a state may not impose a burden which materially affects interstate commerce and in an area where uniformity of regulation is necessary, with numerous cases cited. Thus, in the *Huron Portland Cement Company* case the Court realized that no uniformity was necessary and further found that the ordinance did not place an undue burden on any commercial venture.

The instant case is far different from *Huron*.

Mr. Justice Stewart stated that "although verbal generalizations do not of their own motion decide concrete cases, . . .", they provide framework for determination. We submit that the verbal generalizations of the two cases hereinbefore cited concerning the concurrent jurisdiction show many similarities with the train limit law, and little with the Detroit air ordinance, where no uniformity was required. The general distinction is that the Florida Act is an oppressive burden upon interstate commerce in that it requires massive administrative and procedure measures to be met by those in foreign and interstate commerce. Such measures as filing various financial documents, evidence of insurance (with the insurance companies making certain commitments as to direct suits), and other procedural matters are near impossible for anyone less than giant corporations. In addition, while the Florida Act proports to apply to "everyone" only vessel operators, masters, and terminal operators are required to go through the administrative jungle.

In addition, there is physical interference, direct and indirect. The Florida Act and Regulations in connection therewith, have persons boarding vessels, making navigation decisions without any requirement that they be licensed or that they be competent regarding the decisions that they are making. As in the *Arizona* case, there has been no showing by the State that this burden will benefit the health and welfare of Florida citizens. There has been absolutely no showing that the burden being placed upon shipowners, operators, and terminal operators would in any way protect the public. With untrained persons swarming all over vessels and terminals it is more than likely that the result will be more accidents than ever. Vessel owners, operators and terminal operators would more than likely need protection from the protector.

This Florida Act is not an exercise of police power. It is not the rapier-like thrust of the hundred dollar fine in the *Huron* case. But, it is the bludgeoning of the sledge hammer against the maritime interest that exists in the State of Florida.

Departing from *Huron Portland Cement*, we feel that the Florida Act is further oppressive on interstate commerce. The familiar case of *Gibbons v. Ogden*, 22 U.S. 1 (1824) need hardly be the subject of a recitation of facts, suffice it to say that the acts of the Legislature of the State of New York in granting Robert Livingston and Robert Fulton the exclusive navigation within the jurisdiction of that state for boats moved by steam for a term of five years was void under the commerce clause. In essence, it stands for the proposition that a state may not grant a monopoly of navigation on interstate navigable waters. See I Benedict *American Admiralty* 83 (6th ed. 1940). However, the instant statute *de facto* creates what could not be done directly. While there is no

grant of waters to person named such as Livingston and Fulton what the Florida Legislature has said in essence is, we grant use of our interstate waters only to those who can afford to use them. It is a monopoly granted to those who can meet the financial requirements or who will not be wiped out by a disaster wherein they can plead no defenses. This type of monopoly to the ones who can afford to trade in Florida water is just as unfair as that monopoly that was granted to Livington and Fulton.

II.

THE DISTRICT COURT DID NOT ERR CONCERNING FEDERAL PREEMPTION SINCE IT DID NOT RULE ON THIS POINT.

Appellants state that the District Court erred in construing the Federal Act as pre-empting the states from enacting legislation. The Court simply did not so hold, and this is not an issue. The Court below very appropriately analyzed the applicable portion of the Federal Act and stated "the statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative." That is to say regulating of the *Huron* type case and non-navigable water type cases is possible.

The Federal Act regulates discharge into and upon nevigable waters. This is little conflict as to what navigable waters are, as an example, an acceptable definition has been set forth in *Miller v. City of New York*, 109 U.S. 385 (1883). The Court stated that navigable waters of the United States, such as are under the control of Congress, are such waters as are navigable in fact, in which by themselves or their con-

nection with other waters, form a continuous channel for commerce with foreign countries or among the states. This would be the type of water that would be involved in a civil case under Rule 9(h). It was into that field that Congress moved with the specific Act that we are discussing.

For many years Congress had been active in areas of navigable waters, as well as, upon the high seas. But, the State of Florida is allowed, without fear of any State-Federal conflict, to move into the area of local concern. This area is non-navigable waters. For example, the City or State may clean up back creeks or protect any of our tourist attraction lakes anywhere in the state. In addition, some rivers within the state are and have been declared to be non-navigable and merely an easement to a navigable stream such as certain headwaters of the Suwannee River. How far afield and duplicious it is to have both the Federal and State governments working in the area of navigable bodies of water; with the result, no one claiming the waters within the State such as the lakes and non-navigable areas. Of course, the Federal government will not act in that non-navigable field.

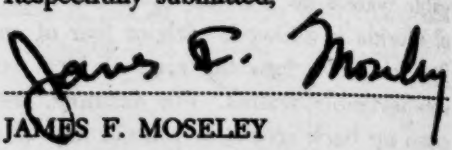
The state's theory once again is predicated upon the fact that they can supplement or fill a "gap." However, as set forth in *Kermarec* and *Branch v. Schumann*, supra, supplementation does not exist. For the Federal government to be supreme in admiralty and maritime matters and for the state to be allowed to move in non-maritime matters does not relegate our Republic to a situation that "Federalism is an academic theory," as advanced by Appellant.

We submit that preemption has not been the subject of determination by the Court and that this is not an issue on appeal.

CONCLUSION

For the reasons and authorities hereinbefore set forth, this Appellee moves and requests this Court to affirm the District Court Judgment declaring that the Florida Act to be null and void.

Respectfully submitted,



JAMES F. MOSELEY

Attorney for Appellees, Suwannee Steamship Company and Commodores Point Terminal Corporation
Suite 1014 Barnett Bank Building
Jacksonville, Florida 32202

I certify pursuant to Rule 33 that three (3) copies of this brief have been mailed, first class and/or air mail as required this 14th day of July, 1972 to all parties of Record.

James F. Moseley

JAMES F. MOSELEY

Toole, Taylor, Moseley, Gabel & Milton
1014 Barnett Bank Building
Jacksonville, Florida 32202